In the Supreme Court of Missouri

No. 86107

TRIARCH INDUSTRIES, INC.,

Appellant,

vs.

PAUL A. CRABTREE
D/B/A CRABTREE PAINTING, INC.,

Respondent.

Appeal from the Circuit Court of Jackson County, Missouri
Hon. Richard E. Standridge, Judge

SUBSTITUTE BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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JURISDICTIONAL STATEMENT

This is an appeal taken pursuant to R.S.Mo. § 435.440 from an order entered by the Circuit Court of Jackson County, Missouri on September 4, 2002, denying Appellant's Motion to Compel Arbitration. The case does not involve the Constitution of the United States or of the State of Missouri, nor does it otherwise fall within the

exclusive jurisdiction of the Missouri Supreme Court. Original jurisdiction of this appeal therefore was vested in the Missouri Court of Appeals, Western District, pursuant to Article V, Section 3 of the Missouri Constitution of 1945, as amended. The Court of Appeals, Western District, entered its Opinion on May 4, 2004. Upon application by Respondent, this Court ordered transfer after opinion. Jurisdiction to order transfer after opinion and to hear this appeal the same as on original appeal is vested in the Supreme Court pursuant to Article V, Section 10 of the Missouri Constitution of 1945, as amended.

STATEMENT OF FACTS

Appellant, a Texas corporation (hereinafter "Triarch"), filed an action in the Associate Circuit Court of Jackson County, Missouri against Respondent, a Missouri resident (hereinafter "Crabtree"), entitled Petition On Open Account alleging non-payment for product represented by attached invoices. (Legal File, 1-8). Crabtree answered, asserting that the subject product was non-conforming, defective and unusable for the particular purpose involved and had been returned and accepted by Triarch such that there was a failure of consideration. (Legal File, 11-12).

After unsuccessfully attempting to resolve the matter by settlement, Crabtree sought and received leave to file a Counterclaim seeking reimbursement of amounts previously paid for purchase of the non-conforming and defective materials and product. (Legal File, 22-24). Crabtree contemporaneously served discovery in the form of Requests for Admissions followed by Interrogatories and Requests for Production of Documents directed to Triarch

(Legal File, 19, 25).

Thereafter, Triarch filed a Motion to Compel Arbitration attaching as exhibits the agreement between the parties, including a document entitled "Conditions of Sale" that contains the following arbitration clause: (Legal File, 26-33):

> "10. ARBITRATION OF DISPUTES: Any controversy or claim arising out of this contract or the breach thereof may, at Seller's option, be referred to non-binding mediation under rules of Seller's choice. If mediation does not result in settlement of the dispute, (or if Seller does not elect to pursue mediation), Seller shall have the right to refer the dispute to binding arbitration under rules of its choice, or to commence litigation." (Legal File, 32).

Crabtree opposed the Motion to Compel Arbitration asserting, *inter alia***,** waiver and estoppel, lack of mutuality and Triarch's election to "commence litigation" under the Conditions of Sale provision. (Legal File, 34-38).

After further briefing and argument, the court overruled Triarch's Motion to Compel Arbitration. Triarch's timely Notice of Appeal to the Missouri Court of Appeal, Western District, followed and this Court granted transfer after opinion.

POINTS RELIED ON

I. THE TRIAL COURT CORRECTLY OVERRULED APPELLANT'S MOTION TO COMPEL ARBITRATION BECAUSE THERE WAS NO AGREEMENT "TO ARBITRATE," "TO SETTLE BY ARBITRATION" OR "TO SUBMIT TO ARBITRATION" ANY CONTROVERSY ARISING OUT OF THE CONTRACT IN THAT THE ARBITRATION CLAUSE WAS LACKING IN MUTUALITY – ONLY RESPONDENT WAS BOUND TO ARBITRATE, WHILE APPELLANT WAS FREE TO CHOOSE EITHER ARBITRATION OR "TO COMMENCE LITIGATION"

Dunn Industrial Group, Inc. v. City of Sugar Creek, 112 S.W.3d 421 (Mo. 2003)

AJM Packaging Corp. v. Crossland Const. Co., Inc., 962 S.W.2d 906 (Mo.App. S.D. 1998)

Business Men's Assur. Co. of America v. Graham, 984 S.W.2d 501 (Mo. 1999)

Dumais v. Am. Golf Corp., 299 F.3d 1216 (10th Cir.2002)

Federal Arbitration Act, 9 U.S.C § 2

II. THE TRIAL COURT CORRECTLY OVERRULED APPELLANT'S MOTION TO COMPEL ARBITRATION BECAUSE THE ARBITRATION CLAUSE IS UNCONSCIONABLE AND THEREFORE UNENFORCEABLE BECAUSE IT IS CONTAINED IN AN ADHESION CONTRACT AND IS SO ONE-SIDED THAT ONE WITH COMMON SENSE WOULD NOT AGREE TO IT IF GIVEN THE FREEDOM TO REJECT IT

Robin v. Blue Cross Hosp. Service, Inc., 637 S.W.2d 695 (Mo.banc 1982)

Estrin Construction Company, Inc. v. Aetna Casualty and Surety Co., 612 S.W.2d 413 (Mo.App. W.D. 1981)

Missouri Dept. of Social Services, Div. of Aging v. Brookside Nursing Center, Inc., 50 S.W.3d 273 (Mo. 2001)

E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 122 S.Ct. 754 (2002)

III. THE TRIAL COURT CORRECTLY OVERRULED APPELLANT'S MOTION TO COMPEL ARBITRATION BECAUSE THE CONTRACT GAVE APPELLANT THE OPTION TO EITHER ARBITRATE OR LITIGATE, BUT NOT THE OPTION TO DO BOTH, SUCH THAT NO FINDING OF PREJUDICE WAS NECESSARY TO SUPPORT THE TRIAL COURT'S CONCLUSION THAT THE CONTRACT DID NOT GIVE APPELLANT THE RIGHT TO COMPEL ARBITRATION AFTER APPELLANT HAD FIRST EXERCISED IT OPTION TO LITIGATE

Brookfield R-III School District v. Tognascioli Gross Jarvis Kautz Architects, Inc., 845 S.W.2d 103 (Mo.App. W.D. 1993)

McCarney v. Nearling Staats, Preloger and Jones, 866 S.W.2d 881 (Mo. App. 1993)

Stifel, Nicholaus and Co., Inc. v. Freeman, 924 F. 2d 157 (8th Cir. 1991)

IV. THE TRIAL COURT CORRECTLY OVERRULED APPELLANT'S MOTION TO COMPEL ARBITRATION BECAUSE EVEN IF A FINDING OF PREJUDICE IS REQUIRED IN ORDER TO FIND THAT APPELLANT HAD WAIVED ANY RIGHT TO COMPEL ARBITRATION, THERE WAS SUFFICIENT EVIDENCE TO DEMONSTRATE SUCH PREJUDICE HERE

Getz Recycling, Inc. v. Watts, 71 S.W.2d 224 (Mo. App. 2002)

Reis v. Peabody Coal Co., 935 S.W.2d 625 (Mo. App. 1996)

Stifel, Nicholaus and Co., Inc v. Freeman, 924 F. 2d 157 (8th Cir. 1991)

ARGUMENT

I. **THE TRIAL COURT CORRECTLY OVERRULED APPELLANT'S MOTION TO COMPEL ARBITRATION BECAUSE THERE WAS NO AGREEMENT "TO ARBITRATE," "TO SETTLE BY ARBITRATION" OR "TO SUBMIT TO ARBITRATION" ANY CONTROVERSY ARISING OUT OF THE CONTRACT IN THAT THE ARBITRATION CLAUSE WAS LACKING IN MUTUALITY – ONLY RESPONDENT WAS BOUND TO ARBITRATE, WHILE APPELLANT WAS FREE TO CHOOSE EITHER ARBITRATION OR "TO COMMENCE LITIGATION"**

Standard of Review

Appellate review of the denial of a motion to stay litigation pending arbitration is essentially *de novo*. ***Metro Demolition & Excavating Co. v. H.B.D. Contracting, Inc***., 37 S.W.3d 843, 846 (Mo.App. E.D. 2001). Although public policy favors enforcement of private arbitration agreements, a party who has not agreed to arbitrate a dispute cannot be forced to do so. ***AJM Packaging Corp. v. Crossland Const. Co., Inc***. 962 S.W.2d 906, 911 (Mo.App. S.D. 1998). An appellate court is primarily concerned with the correctness of the trial court's result, not the route taken by the trial court to reach that result, such that the judgment will be affirmed if cognizable under any theory, regardless of whether the reasons advanced by the trial court are wrong or not sufficient. ***Business Men's Assur. Co. of***

America v. Graham, 984 S.W.2d 501, 505-06 (Mo. 1999).

Argument

Appellant's Motion to Compel Arbitration was based on the Federal Arbitration Act, 9 U.S.C § 2. (Legal File, 27). Although the Federal Arbitration Act (FAA) evinces a liberal policy favoring arbitration agreements so that disputes might be resolved without resort to the courts, before a party may be compelled to arbitrate under the FAA, a court must determine whether a valid agreement to arbitrate exists between the parties and whether the specific dispute falls within the substantive scope of that agreement. ***Dunn Industrial Group, Inc. v. City of Sugar Creek***, 112 S.W.3d 421, 427-28 (Mo. 2003).

Thus, the threshold issue for the trial court was: is there a "valid agreement to arbitrate" that exists between the parties? The answer to that threshold inquiry in this case is, "no," such that the order of the trial court should be affirmed.

The most that can be said of the arbitration provision in this case is that is purports to obligate one party – Respondent – to arbitrate a dispute if and only if the other party – Appellant – exercised its unilateral option "to refer the dispute to binding arbitration under rules of its choice." (Legal File, 32). Because Respondent had no corresponding right "to refer [a] dispute to binding arbitration," there was no valid "agreement to arbitrate" so as to trigger the application of the FAA. Numerous federal courts have so held. ***Dumais v. Am. Golf Corp***., 299 F.3d 1216, 1219 (10th Cir. 2002) ("We join other circuits in holding that an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory."); ***Floss v. Ryan's***

Family Steak Houses, Inc., 211 F.3d 306, 315-16 (6th Cir.2000) (arbitration agreement was "fatally indefinite" and illusory because employer "reserved the right to alter applicable rules and procedures without any obligation to notify, much less receive consent from," other parties) (citing 1 SAMUEL WILLISTON, CONTRACTS § 43, at 140 (3d ed.1957)); ***Hooters of Am., Inc. v. Phillips***, 173 F.3d 933, 939 (4th Cir.1999) (arbitration agreement unenforceable in part because Hooters, but not employee, could cancel agreement with 30 days notice, and Hooters reserved the right to modify the rules "without notice"; "[n]othing in the rules even prohibits Hooters from changing the rules in the middle of an arbitration proceeding."); ***Gibson v. Neighborhood Health Clinics***, 121 F.3d 1126, 1133 (7th Cir.1997) (Cudahy, J., concurring) (promise to arbitrate was illusory in part because employer retained the right to change or revoke the agreement "at any time and without notice"); ***Snow v. BE & K Constr. Co.***, 126 F.Supp.2d 5, 14-15 (D.Maine 2001) (citations omitted)(arbitration agreement illusory because employer reserved the right to modify or discontinue the arbitration program at any time enabling the company to avoid the terms of the booklet if it later realized the booklet's terms no longer served its interests); ***Trumbull v. Century Mktg. Corp.***, 12 F.Supp.2d 683, 686 (N.D.Ohio 1998)(no binding arbitration agreement because the plaintiff would be bound by all the terms of the handbook while defendant could simply revoke any term including the arbitration clause whenever it desired); ***Simpson v. Grimes***, 849 So.2d 740, 748 (La.Ct.App.2003) (arbitration agreement lacked mutuality, making it "unconscionable and unenforceable"):

The majority opinion of the Court of Appeals confuses the doctrine of mutuality of obligation in the sense of the basic consideration necessary to support a contract, with the FAA's threshold requirement that the parties be mutually bound to arbitrate before a "valid agreement to arbitrate" will come into being, thus triggering the applicability of the FAA. "Mutuality of contract" in the more general sense, means only that an obligation rests upon each party to do or permit to be done something in consideration of the act or promise of the other; that is, neither party is bound unless both are bound. ***Sumners v. Service Vending Co., Inc.*** 102 S.W.3d 37, 41 (Mo.App. S.D. 2003). However, nothing in the text of the FAA, and none of the cases interpreting the FAA have held that the FAA requires a court to enforce a unilateral option – as opposed to a bilateral agreement – to arbitrate.

In addition to the federal courts cited above, numerous state courts have held that for the FAA to apply, there must be mutual promises to arbitrate: ***Salazar v. Citadel Communications Corp***., 90 P.3d 466, 471 (N.M. 2004)(where defendant reserved the right to modify any provision of the Handbook at any time, the Agreement to Arbitrate is an unenforceable illusory promise); ***Cheek v. United Healthcare of Mid-Atlantic, Inc***., 378 Md. 139, 153-54, 835 A.2d 656, 665 (Md. 2003)(in a motion to compel arbitration, a court must determine whether there is a mutual exchange of promises to arbitrate); ***E-Z Cash Advance, Inc. v. Harris,*** 347 Ark. 132, 141, 60 S.W.3d 436, 442 (Ark. 2001)(Harris's promise to submit to arbitration is not enforceable, because E-Z Cash has the option of pursuing arbitration or bringing suit in court, causing arbitration

agreement to lack the element of mutuality); ***Discover Bank v. Shea,*** 362 N.J.Super. 200, 203, 827 A.2d 358, 360 (N.J.Super.L. 2001)(only those disputes for which there is a *mutual* agreement to arbitrate can be compelled to arbitration); ***Thompson v. Norfolk Southern Ry. Co.*** 140 N.C.App. 115, 120, 535 S.E.2d 397, 400 (N.C.App. 2000)(party seeking to compel arbitration must prove the existence of a mutual agreement to arbitrate); ***Williams v. Aetna Finance Company***, 83 Ohio St.3d 464, 700 N.E.2d 859 (1998), *cert. denied*, 526 U.S. 1051, 119 S.Ct. 1357, 143 L.Ed.2d 518 (1999)(refusing to enforce arbitration clause in a consumer loan contract which preserved for finance company the judicial remedy of foreclosure but restricted the debtor's remedy solely to arbitration)***; Stanley-Bostitch, Inc. v. Regenerative Environmental Equipment Co., Inc.*** 697 A.2d 323, 326 (R.I. 1997)(mutual assent objectively manifested by the writings of the parties is a condition precedent to the formation of a binding agreement to arbitrate).

Because there was no mutual obligation to arbitrate, there was no "agreement to arbitrate" so as to trigger the arbitration protection provisions of the FAA. Thus, the trial court correctly denied Appellant's motion to compel arbitration.

II. THE TRIAL COURT CORRECTLY OVERRULED APPELLANT'S MOTION TO COMPEL ARBITRATION BECAUSE THE ARBITRATION CLAUSE IS UNCONSCIONABLE AND THEREFORE UNENFORCEABLE BECAUSE IT IS CONTAINED IN AN ADHESION CONTRACT AND IS SO ONE-SIDED THAT ONE WITH COMMON SENSE WOULD NOT AGREE TO IT IF GIVEN THE FREEDOM TO REJECT IT

Standard of Review

The standard of review for Point II is the same as it is for Point I, that is, *de novo.* *See* p. 6, supra.

Argument

An adhesion contract is a form agreement created by the stronger of the contracting parties. It is offered on a "take this or nothing" basis. ***Robin v. Blue Cross Hosp. Service, Inc.*** 637 S.W.2d 695, 697 (Mo.banc 1982). Where the contract at issue is deemed a contract of adhesion, the objectively reasonable expectations of the weaker party will be honored even though painstaking study of the contract provisions would have negated those expectations. ***Estrin Construction Company, Inc. v. Aetna Casualty and Surety Co.,*** 612 S.W.2d 413, 424 (Mo.App. W.D. 1981). A contractual provision is "unconscionable" where it presents an inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it. ***Missouri Dept. of Social Services, Div. of Aging v.***

Brookside Nursing Center, Inc., 50 S.W.3d 273, (Mo. 2001) *citing,* **RESTATEMENT (SECOND) OF CONTRACTS § 153.**

Moreover, the fundamental nature of the due process right to a jury trial demands that it be protected from an unknowing and involuntary waiver. ***Malan Realty Investors, Inc. v. Harris,*** 953 S.W.2d 624, 627 (Mo. 1997). The standard that is universally applied to prevent overreaching and to protect against unequal bargaining positions requires that the trial court determine whether such a waiver is knowingly and voluntarily or intelligently made before it will be enforced. ***Id.***

The purpose of the FAA is "to make arbitration agreements as enforceable as other contracts, but not more so." ***E.E.O.C. v. Waffle House, Inc.*** 534 U.S. 279, 294, 122 S.Ct. 754, 764 (2002). Accordingly, even if the lack of mutuality is not fatal to the presence of "an agreement to arbitrate" as urged in Point I, the Court may still apply the rules applicable to *all other adhesion contracts* and strike down the arbitration agreement as so one-sided that it is contrary to the reasonable expectations of the weaker party.

There is no real dispute that the arbitration agreement in this case was presented on a take it or leave it basis by the stronger party. In fact, the contract signed between the two parties in this case consists of two pages, neither one of which contains any reference to the arbitration provision. (Legal file, 29-30). The arbitration provision is contained in a separate, three page document entitled "Conditions of Sale" that is signed by neither party. The separate, three page document concludes with the statement, "BY ORDERING FOR SHIPMENT ANY MATERIAL UNDER THIS CONTRACT,

BUYER AGREES TO ALL OF THE TERMS AND CONDITIONS CONTAINED HEREIN." In other words, "take it or leave it."

In addition to being a part of an adhesion contract, the arbitration provision at issue here "presents an inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it." ***Missouri Dept. of Social Services, Div. of Aging v. Brookside Nursing Center, Inc***., *supra*. Not only does Appellant have the sole right to decide whether to arbitrate or to litigate, it has the right to make up the rules: "Seller shall have the right to refer the dispute to binding arbitration *under rules of its choice*." (Legal file, 32)(Emphasis added).

In ***Swain v. Auto Services, Inc.,*** 128 S.W.3d 103, 108 (Mo.App. E.D. 2003), the Eastern District held that an agreement that simply chooses arbitration over litigation, even between parties of unequal bargaining power, without more, is not unconscionably unfair. The difference between the arbitration agreement here and the arbitration agreement at issue in ***Swain***, is the extent to which the party drafting the adhesion contract overreached with respect to the specific terms of the arbitration agreement.

Because the contract quite literally gives Triarch the unilateral right to make up the rules, there is nothing in the contract to prohibit Triarch from imposing numerous conditions on Crabtree that have been stricken down as unconscionable, such as:

- unilaterally selecting the arbitrator;
- improperly limiting discovery; or

- imposing excessive costs on Crabtree, to name a few.

Numerous courts have found arbitration agreements unconscionable where one party has the sole right to select the arbitrator. ***Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler***, 825 So.2d 779, 784 (Ala. 2002)("Our research has not disclosed a single case upholding a provision in an arbitration agreement in which appointment of the arbitrator is within the exclusive control of one of the parties."); ***Burch v. Second Judicial Dist. Court of State ex rel. County of Washoe***, 49 P.3d 647, 650-51 (Nev. 2002) (arbitration agreement is unconscionable where it gives one party the unilateral and exclusive right to decide the rules that govern the arbitration and to select the arbitrators).

Likewise, provisions that unduly limit discovery have been found to be unconscionable. ***Fitz v. NCR Corp.,*** 118 Cal.App.4th 702, 726-727, 13 Cal.Rptr.3d 88, 106 (Cal.App. 4 Dist. 2004)(a limitation on discovery that does not provide the weaker party with sufficient opportunity to vindicate her claims is unconscionable); ***In re Luna,*** 2004 WL 2005935, *1 (Tex.App-Hous 2004). Similarly, causes that shift the costs to the weaker party have been held unconscionable.

Bellevue Drug Co. v. Advance PCS, 2004 WL 1924964, 9 (E.D.Pa. August 20, 2004)(agreement which requires fee-shifting of arbitration costs and attorney's fees is unconscionable); ***Parilla v. IAP Worldwide Services, VI, Inc.,*** 368 F.3d 269, 278 (3rd Cir. 2004)(agreement that provides that each party shall bear its own costs and expenses, including attorney's fees held this be substantively unconscionable).

Appellant should not be permitted to give itself sure latitude in the argument that it

can lure Respondent into arbitration and then lower the boom of imposing unconscionable rules on Respondent. The very vagueness of the provision, coupled with giving all of the options to Appellant, make the arbitration provisions unconscionable.

III. THE TRIAL COURT CORRECTLY OVERRULED APPELLANT'S MOTION TO COMPEL ARBITRATION BECAUSE THE CONTRACT GAVE APPELLANT THE OPTION TO EITHER ARBITRATE OR LITIGATE, BUT NOT THE OPTION TO DO BOTH, SUCH THAT NO FINDING OF PREJUDICE WAS NECESSARY TO SUPPORT THE TRIAL COURT'S CONCLUSION THAT THE CONTRACT DID NOT GIVE APPELLANT THE RIGHT TO COMPEL ARBITRATION AFTER APPELLANT HAD FIRST EXERCISED ITS OPTION TO LITIGATE

Standard of Review

The standard of review for Point III is the same as it is for Point I, that is, *de novo.* *See* p. 6, *supra*.

Argument

There is a significant difference between language of the arbitration provisions at issue in the cases relied upon by Appellant and the language in Appellant's form agreement. Specifically, each of the cases relied upon by Appellant involve a mandatory arbitration agreement, whereas Appellant's provision provided Appellant with a choice to

either arbitrate or litigate; Appellant chose to litigate.

Appellant Triarch's provision entitled Arbitration of Disputes provides:

"10. ARBITRATION OF DISPUTES: Any controversy or claim arising out of this contract or the breach thereof may, at Seller's option, be referred to non-binding mediation under rules of Seller's choice. If mediation does not result in settlement of the dispute, (or if Seller does not elect to pursue mediation), Seller shall have the right to refer the dispute to binding arbitration under rules of its choice, or to commence litigation."

In contrast, the arbitration provision upheld in ***Brookfield R-III School District v. Tognascioli Gross Jarvis Kautz Architects, Inc.,*** 845 S.W.2d 103, 106 (Mo.App. W.D. 1993), unquestionably, mandated the use of arbitration:

"claims, disputes and other matters in question between the parties to this agreement, arising out of or relating to this agreement or the breach thereof, *shall be* decided by arbitration..." (emphasis added)

Similarly, the arbitration provision at issue in ***McCarney v. Nearling Staats, Preloger and Jones,*** 866 S.W.2d 881, 889 (Mo. App. 1993), was mandatory, requiring that:

"Any controversy or claim arising out of or related to the contract or to breach thereof, *shall be* settled by arbitration in accordance with the construction industry arbitration rules of the American Arbitration Association..." (emphasis added)

Likewise, the court's opinion in ***Stifel, Nicholaus and Co., Inc. v. Freeman***, 924 F. 2d 157, 158 (8th Cir. 1991), required that the parties arbitrate all controversies except

those:

> "...for which a remedy may exist pursuant to an express or implied right of action under the federal securities laws."

In sharp contrast to the definitively mandatory arbitration provisions at issue in the cited cases, Triarch's arbitration provision allowed Appellant, at its sole option, to choose between binding arbitration under rules of its own choice or to commence litigation. Triarch chose to commence litigation and the trial court correctly held Triarch to that choice.

Where an arbitration agreement is mandatory and binding on both parties, a rule requiring prejudice to the opposing party before waiver is found to occur serves to protect the expectations of both parties who mutually committed to binding arbitration. However, given the unilateral nature of Appellant's arbitration provision, requiring a finding of prejudice in this case would serve no such purpose. Respondent had no right to insist upon arbitration; Triarch granted that option only to itself. Once Triarch elected to litigate, rather than refer the dispute to binding arbitration, neither party had the right to insist upon arbitration – Crabtree never had the right and Triarch surrendered the right when it elected litigation.

In this case, unlike in cases where one party acts contrary to a mandatory arbitration provision binding on both parties, neither party had any right or duty to arbitrate after Triarch elected litigation. Therefore, no finding of prejudice is necessary in order for the court to hold that Triarch, once it elected litigation, had no right or ability

under the contract to reverse that choice.

IV. THE TRIAL COURT CORRECTLY OVERRULED APPELLANT'S MOTION TO COMPEL ARBITRATION BECAUSE EVEN IF A FINDING OF PREJUDICE IS REQUIRED IN ORDER TO FIND THAT APPELLANT HAD WAIVED ANY RIGHT TO COMPEL ARBITRATION, THERE WAS SUFFICIENT EVIDENCE TO DEMONSTRATE SUCH PREJUDICE HERE

Standard of Review

The standard of review for Point IV is the same as it is for Point I, that is, *de novo.* *See* p. 6, supra.

Argument

Although courts have generally favored arbitration clauses and indulged a presumption in their favor, certainly the right to arbitrate may be waived where the court finds that the proponent knowingly acted inconsistently with the right to arbitrate to the opposition's prejudice. ***Getz Recycling, Inc. v. Watts,*** 71 S.W.2d 224, 228-29 (Mo. App. 2002).

In ***Getz***, the court found that substantial trial-oriented activity was sufficient to constitute the prejudice element necessary to find waiver of the arbitration provision. There, Plaintiff filed an action for breach of contract, sought and received a Temporary Restraining Order and Order of Replevin in the context of a lease dispute in which the lease payments and surrender of property were at issue. The defendant in ***Getz*** counterclaimed for breach

of contract, warranties and misrepresentations contending, as does Respondent here, that the machine was useless for the purposes intended. Return of the machine and the posting of a Replevin Bond pending resolution of the action were eventually stipulated to by the parties. Thereafter, Getz filed an application to stay the court proceedings and to enforce the arbitration clause contained in the lease agreement. Getz's motion was denied.

As in the instant matter, the ***Getz*** court found that, in drafting the agreement containing the arbitration provision and in initiating the lawsuit Getz knowingly acted inconsistently with its right to arbitrate. The ***Getz*** court also noted that the prejudice element is determined on a case-by-case basis, *citing* ***Reis v. Peabody Coal Co.,*** 935 S.W.2d 625, 631 (Mo. App. 1996). While a time delay between filing of the lawsuit and invocation of the arbitration provision, even where a substantial amount of discovery had already been conducted, does not in, and of itself, meet the prejudice requirement, the ***Getz*** court held that the substantial trial-oriented activity involved there was sufficient to result in waiver of the arbitration provision.

Here, Triarch initiated the lawsuit in the face of its own contract-imposed provision that any controversy or claim arising out of the contract, at its sole option, could be referred to binding arbitration *after* Triarch skipped entirely the procedure for referring the matter to mediation. In the quote contained in Appellant's Brief citing ***Stifel, Nicholaus and Co., Inc v. Freeman****, supra*, Appellant omitted the following sentence:

> "Additionally, a party's failure to assert a pre-litigation demand for arbitration may contribute to a finding of prejudice because the other party has no notice of intent to

arbitrate."

924 F.2d at 159, *citing* ***Prudential-Bache Securities vs. Stevenson***, 706 Fed. Supp. 533, 535 (S.D.Tex. 1989)

The absence of a pre-litigation demand for arbitration on its part is a separate factor which the trial court may take into account in its analysis of the prejudice element. That factor weighs in support of the trial court's denial of the motion to compel arbitration. Only after Crabtree's Answer to the lawsuit raised and joined issues regarding the defective and non-conforming nature of the goods Triarch provided and Crabtree counterclaimed for recovery of the amounts already paid for those goods and only after discovery in the form of requests for admissions, interrogatories and document production requests was prepared and served did Triarch seek to utilize the Agreements and Condition of Sale containing the optional arbitration provision. No prior notice was given by Triarch of its intention to invoke the optional arbitration provision.

The trial court here could properly and did correctly consider all these factors in determining prejudice in the face of the conceded other factors of knowingly acting inconsistently with the right to arbitrate.

CONCLUSION

Because there was no mutual right to arbitration, the arbitration provision at issue in this case is not an "agreement to arbitrate" such that the provision is not under the mantle of protection afforded such agreements by the Federal Arbitration Act. Moreover, the arbitration provision should be held unconscionable because it was buried within an adhesion

contract and was so one-sided that no reasonable person would agree to it if given the choice. Finally, Appellant waived whatever right it had to arbitration by electing litigation under the option to choose litigation provision of the adhesion contract and there was sufficient prejudice to Respondent even if the court were to require a finding of such prejudice. For all the foregoing reasons, the order of the trial court denying Appellant's motion to compel arbitration should be affirmed.

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CERTIFICATE OF MAILING

A true and accurate copy of the above and foregoing was mailed, via regular U.S. Mail, this 4th day of October, 2004 to:

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Attorneys for Appellant Triarch Industries, Inc.

CERTIFICATE OF COMPLIANCE

STATE OF MISSOURI)
) SS.
COUNTY OF JACKSON)

I, James L. Baker, first being duly sworn upon my oath, state as follows:

A. I am a licensed attorney in the State of Missouri.

B. I am the attorney for Respondent in this case.

C. I certify that the disk contained with this Brief has been scanned for viruses and none was detected.

4. The Brief of Respondent includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b).

5. The word count of this document is 5714.

_____
James L. Baker

_____
Notary Public